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Defining Willfulness Under the ADEA: Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613 (1985)

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NOTE

DEFINING WILLFULNESS UNDER THE ADEA: *Trans World Airlines v. Thurston*, 105 S. Ct. 613 (1985)

The standard of "willfulness" is crucial to claimants under the Age Discrimination in Employment Act (ADEA) because a finding of "willfulness" entitles a claimant to liquidated double damages.[1] In *Trans World Airlines v. Thurston*[2] the Supreme Court recently ended a controversy that had been debated in the district courts over the standard to be used in determining if an employer had "willfully" violated the ADEA. In that case the Court held that good faith is a defense to liquidated damages under ADEA.[3] This Note will examine how courts have defined "willful" in the past and discuss the present standard of determining a willful violation of the ADEA.

I. STATEMENT OF THE CASE

In 1978 the ADEA was amended to prohibit the mandatory retirement of employees because of their age.[4] Concerned that its company's retirement plan violated the amendments, TWA implemented a new plan which permitted

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1. 29 U.S.C. § 621-634 (1982). Congress enacted the ADEA in 1967 to protect individuals from arbitrary age discrimination in employment. Section 623(a) of the Act makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age; [or]

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

2. 105 S. Ct. 613 (1985).

3. *Id.* at 626.

4. The statute as amended appears at 29 U.S.C. §623(f)(2) (1982). For a discussion of the mandatory age retirement of airline pilots see Comment, *Mandatory Retirement of Airline Pilots: An Analysis of the FAA's Age 60 Retirement Rule*, 33 HASTINGS L. J. 241 (1981). *See generally* Comment, *Mandatory Retirement: Discrimination Against the Aged Minority*, 23 S.D. L. REV. 358 (1978) (criticizing mandatory retirement as a subtle form of age discrimination).

any employee with "in flight status"[5] at age 60 to continue working in that capacity.[6] The plan, however, did not give a sixty year old captain the right to automatically begin training for an "in flight status" position. Instead, TWA's plan allowed the captain to remain with the airline only if "flight status" could be obtained by a transfer through the bidding procedures outlined in the collective bargaining agreement[7] between TWA and Air Line Pilots Association (ALPA).[8]

Plaintiffs, former captains for TWA, were retired by TWA when they reached the age of sixty. Each was denied an opportunity to obtain in flight status and displace a less senior flight engineer through the bidding procedures.[9] Plaintiffs filed an action against TWA and ALPA in district court,[10] claiming that TWA's bidding procedure violated section 623(a)(1) of the ADEA.[11] The United States District Court for the Southern District of New York entered summary judgment in favor of TWA and ALPA,[12] holding that the plaintiffs had failed to establish a prima facie case of age discrimination under the test set forth in *McDonnell Douglas Corp. v. Green*.[13] The district court also determined that TWA's

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5. Personnel with "in flight status" include the cockpit crew. TWA has three cockpit positions on most of its flights. "The 'captain' is the pilot and controls the aircraft. . . . The 'first officer' is the copilot and assists the captain. . . . The 'flight engineer' monitors a side-facing instrument panel." *Thurston*, 105 S. Ct. at 618.

6. *Id.* at 618.

7. Under the collective bargaining agreement, a captain displaced for any reason besides age would not have to resort to the bidding procedures. For example, a medically disabled captain's ability to displace a less senior flight engineer would not depend upon the availability of a vacancy. The bidding "procedures require a captain, prior to his 60th birthday, to submit a 'standing bid' for the position of flight engineer. When a vacancy occurs, it is assigned to the most senior captain with a standing bid. If no vacancy occurs prior to his 60th birthday, or if he lacks sufficient seniority to bid successfully for those vacancies that do occur, the captain is retired." *Id.* at 619.

8. *Id.*

9. *Id.* at 619-20.

10. *See* Air Line Pilots Ass'n Int'l v. Trans World Air Lines, 547 F. Supp. 1221 (S.D.N.Y. 1982).

11. *See supra* note 1 for text of 29 U.S.C. § 623(a)(1) (1982).

12. *Air Line Pilots Ass'n Int'l*, 547 F. Supp. at 1232.

13. 411 U.S. 792 (1973). Under the McDonnell Douglas test if the plaintiff establishes a prima facie case, the burden shifts and the employer must articulate a legitimate reason for its employment decision. The plaintiff then has the opportunity to show the employer's reason was a pretext for discrimination. *Id.* at 802-04. For a discussion of the McDonnell Douglas guidelines see Liddle, *Disparate Treatment Claims Under ADEA: The Negative Impact of McDonnell Douglas v. Green*, 5 EMPLOYEE REL. L. J.

ADEA affirmative defenses, "bona fide occupational qualification" (BFOQ)[14] and "bona fide seniority system"[15] justified TWA's transfer policy.[16]

The Second Circuit Court of Appeals reversed the district court's decision and held that the *McDonnell Douglas* test was inapplicable where the plaintiff showed direct proof of age discrimination.[17] The court found that TWA had violated the ADEA by not permitting sixty year old captains to displace less senior flight engineers when captains disqualified for reasons other than age were so permitted.[18] The court also held that the affirmative defenses of the ADEA did not justify TWA's discriminatory transfer policy. Consequently, TWA was deemed liable for liquidated damages under the ADEA because its violation of the ADEA was "willful."[19]

The United States Supreme Court granted certiorari.[20] The Court affirmed the Second Circuit's holding that the *McDonnell Douglas* test was inapplicable.[21] The *Thurston* Court further held that TWA's affirmative defenses were meritless by holding first, that age does not constitute a bona fide occupational (BFOQ) qualification for the position of flight engineer and second, that TWA's transfer policy is not part of a bona fide seniority system.[22]

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549 (1980); Note, *Civil Rights — Use of Direct Evidence to Establish a Prima Facie Case of Age Discrimination Under the ADEA Obviates Need to Make Independent Showing of Pretext*, 18 WAKE FOREST L. REV. 59 (1982).

14. The ADEA has three defenses to the rule against employer discrimination: 1) when age is a valid occupational qualification necessary for normal business operation; 2) when the employer is observing the terms of a bona fide employee benefit plan; and 3) when the discharge or discipline of an employee is for good cause. 29 U.S.C. § 623(f) (1982). For discussion of the BFOQ used as a defense see McKenry, *Enforcement of Age Discrimination in Employment Legislation*, 32 HASTINGS L. J. 1157 (1981); Comment, *A New Interpretation of the BFOQ Exception*, 31 AM. U.L. REV. 391 (1982); Comment, *Age Discrimination of Airline Pilots: Effects of the Bona Fide Occupational Qualification*, 48 J. AIR L. & COM. 383 (1983).

15. The 1978 Amendments revised the bona fide seniority system by prohibiting forced retirement based on age. 29 U.S.C. § 623(f)(2) (1982).

16. *Air Line Pilots Ass'n Int'l*, 547 F. Supp. at 1231.

17. Air Line Pilots Ass'n Int'l v. Trans World Airlines, 713 F.2d 940, 952 (2d Cir. 1983).

18. *Id.* at 955.

19. *Id.* at 956-57.

20. *See* Trans World Airlines v. Thurston, 465 U.S. 1065 (1985).

21. Trans World Airlines v. Thurston, 105 S. Ct. 613, 620-21 (1985).

22. *Id.* at 623.

Although the Court agreed that there had been a violation of the ADEA, it did not find that the violation was willful within the meaning of section 626(b) of the Act. This determination precluded an award to the plaintiffs of double damages.[23] However, the Court affirmed the Second Circuit's finding that a violation is "willful" if an employer knows conduct is prohibited by the ADEA or shows a "reckless disregard" for considering whether or not it is so prohibited.[24]

II. STANDARDS OF WILLFULNESS

Enforcement of the ADEA is implemented through the powers, remedies and procedures set forth in the Fair Labor Standards Act (FLSA).[25] The ADEA, unlike the FLSA,[26] does not mandate an automatic doubling of damages for any violation of its provisions. Section 626(b) of the ADEA allows for the doubling of damages only in cases of "willful violations" of the Act.

While the definition of willful is important in determining the award of damages, neither the text of the ADEA nor its legislative history has defined the term. Prior to the *Thurston* decision, numerous methods for determining the standard of willfulness emerged.[27] Some courts use a broad definition stating that the employer need only be aware that the statute applies to its business practices or conduct.[28] Other courts,

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23. *Id.* at 626.

24. *Id.* at 625-26.

25. The ADEA itself provides for this at 29 U.S.C. § 626(b) (1982).

26. The Fair Labor Standards Act (FLSA) makes the award of liquidated damages mandatory. Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 209-219 (1982)).

27. For a discussion of the standards of willfulness under the ADEA see Comment, *The Standard of Willfulness for Liquidated Damages Under the Age Discrimination in Employment Act*, 32 EMORY L.J. 583 (1983); Comment, *Punitive Damages Under the Age Discrimination in Employment Act*, 33 HASTINGS L.J. 457, 477-79 (1981).

28. *See, e.g.*, Marshall v. Erin Food Serv., 672 F.2d 229 (1st Cir. 1982) (FLSA case); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981) (ADEA case); Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974) (FLSA case); Brennan v. J.M. Fields, Inc., 488 F.2d 443, 448 (5th Cir. 1973), *cert denied*, 419 U.S. 881 (1974) (EPA case); Coleman v. Jiffy June Farms, 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972) (FLSA case); Majchrzak v. Chrysler Credit Corp., 537 F. Supp. 33, 38 (E.D. Mich. 1981) (FLSA case); Marshall v. Georgia Southwestern College, 489 F. Supp. 1322, 1331 (M.D. Ga. 1980) (EPA case); Pedreya v. Cornell Prescription Pharmacies, 465 F. Supp. 936, 949-50 (D. Colo. 1979) (EPA case); Marshall v. Sam Dell's Dodge Corp., 451 F. Supp. 294, 304-05 (N.D.N.Y. 1978) (FLSA case); Herman v. Roosevelt

using a narrower definition, have required that the employer violate the statute deliberately.[29]

Several courts, relying on the broad statutory definition of "willful" have held that there is a violation if the employer simply knew that the ADEA was "in the picture."[30] This definition, when applied to the ADEA's liquidated damages provision, would result in an award of double damages every time a claimant could prove the employer was merely aware of the Act.[31] In *Spagnuolo v. Whirlpool Corp.*[32] the court concluded that the ADEA liquidated damages provision derived its concept of "willfulness" from the FLSA statute of limitations.[33] Based on that FLSA definition, the court held the defendant had committed a "willful" violation of the ADEA because he admitted to being aware of the Act.[34]

The narrower definition of "willful" used to determine liquidated damages under the ADEA requires that the discrimi-

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Fed. Sav. & Loan Ass'n, 432 F. Supp. 843, 851 (E.D. Mo. 1977), *aff'd*, F.2d 1033 (8th Cir. 1978) (EPA case); Usery v. Godwin Hardware, Inc., 426 F. Supp. 1243, 1267 (W.D. Mich. 1976) (FLSA case); Bailey v. Pilots' Ass'n, 406 F. Supp. 1302, 1308 (E.D. Pa. 1976) (FLSA case); Conklin v. Joseph C. Hofgesang Sand Co., 407 F. Supp. 1090, 1094 (W.D. Ky. 1975) (FLSA case); Brennan v. S & M Enter., 362 F. Supp. 595, 600 (D.D.C. 1973), *aff'd*, 505 F.2d 475 (D.C. Cir. 1974) (FLSA case); Hodgson v. Eunice Superette, Inc., 368 F. Supp. 639, 644 (W.D. La. 1973) (FLSA case).

29. *See, e.g.*, Melanson v. Rantoul, 536 F. Supp. 271 (D.R.I. 1982) (EPA case); Marshall v. J. C. Penny Co., 464 F. Supp. 1166, 1194 (N.D. Ohio 1979) (EPA case); Boll v. Federal Reserve Bank, 365 F. Supp. 637, 648-49 (E. D. Mo. 1973), *aff'd*, 497 F.2d 335 (8th Cir. 1974) (FLSA case); Hodgson v. Hyatt, 318 F. Supp. 390, 392-93 (N.D. Fla. 1970) (FLSA case); Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257, 263-64 (E.D. Wis. 1970) (EPA case); Darod v. Blackstone Cleaners, Inc., 306 F. Supp. 1276, 1281 (N.D. Tex. 1969) (FLSA case).

30. *See, e.g.*, Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972). For cases that applied the *Coleman* test and found a "willful" violation, see Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974) (company president testified that he knew of the existence of the FLSA and had heard talk that recent amendments had extended coverage to his employees); Brennan v. J. M. Fields, Inc., 488 F.2d 443 (5th Cir. 1973), *cert. denied*, 419 U.S. 881 (1974) (defendant's central office sent memoranda to district managers advising them of the requirements of the EPA); Pedreyra v. Cornell Prescripton Pharmacies, 465 F. Supp. 936 (D. Colo. 1979) (defendant had previously violated the Act, had copies of the Act, and was aware that it paid the female plaintiff less than it paid men); Brennan v. S & M Enter., 362 F. Supp. 595 (D.D.C. 1973), *aff'd.*, 505 F.2d 475 (D.C. Cir. 1974) (prior investigation by the Secretary of Labor put defendants on notice that the FLSA was in the picture).

31. *See* Hendrick v. Hercules, Inc., 658 F.2d 1088 (5th Cir. 1981).

32. 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981).

33. *Id.* at 1113.

34. *Id.* at 1114.

natory discharge be voluntary, knowing, or intentional. The Third Circuit, in *Wehr v. Burroughs Corp.*[35] applied this standard. The court reasoned that neither the legislative history nor the text of the Act indicates that "willful" is limited to intentional violations of the ADEA.[36] Therefore, the court concluded that not only intentional conduct, but knowing or reckless conduct should also be considered "willful".[37]

A similar definition for "willful" was stated by the Ninth Circuit in *Kelly v. American Standard, Inc.*[38] The *Kelly* court held that an employer's conduct can violate the ADEA without being knowing and voluntary.[39] Holding differently would encourage employers to remain ignorant of the Act.[40] In reaching this conclusion, the court relied upon decisions from other jurisdictions where courts had awarded liquidated damages without requiring proof of the employer's knowledge of the ADEA.[41] The court particularly relied on the *Wehr* court's reasoning. The *Wehr* court upheld an award of liquidated damages against an employer who acted knowingly but without a specific intent to violate the Act.[42] However, unlike the court in *Wehr*, the *Kelly* court did not extend their definition of "willful" to encompass even reckless violations.[43]

The Seventh Circuit has adopted a standard similar to those applied in *Wehr* and *Kelly*. In *Syvock v. Milwaukee Boiler Manufacturing Co.*,[44] the Seventh Circuit agreed with the *Kelly* holding that while the employer's state of mind is not necessary to establish a prima facie liability under the

35. 619 F.2d 276 (3rd Cir. 1980). The *Wehr* court stated that the term "willful" is associated with three degrees of culpability: intention, knowing, or reckless. *Id.* at 282.

36. *Id.* at 282-83.

37. *Id.* The court found violations of the ADEA to be "willful" when an employer discharged an employee because of age and when the discharge was voluntary and not accidental, mistaken, or inadvertent. *Id.*

38. 640 F.2d 974 (9th Cir. 1981).

39. *Id.* at 980.

40. *Id.*

41. *Id.* at 979-80. The cases relied upon by the court were Wehr v. Burroughs Corp., 619 F.2d 276, 283 (3d Cir. 1980); Buckholz v. Symons Mfg. Co., 445 F. Supp. 706, 713 (E.D. Wis. 1978); Rogers v. Exxon Research & Eng'g Co., 404 F. Supp. 324, 334 (D.N.J. 1975), *rev'd on other grounds*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

42. *Wehr*, 619 F.2d at 282-83.

43. *Kelly*, 640 F.2d at 980 n.7.

44. 665 F.2d 149 (7th Cir. 1981).

ADEA, it is required to show a "willful" violation.[45] Yet, *Syvock* went further than *Kelly* in assessing a defendant's liability. The standard articulated in *Syvock* requires not only that the defendant's actions were knowing and voluntary, but also that the defendant knew or reasonably should have known that his or her particular actions violated the Act.[46]

Another standard of "willfulness" comes out of FLSA's criminal provisions. Section 216(a) of the FLSA, indicates that anyone who "willfully" violates the Act is subject to criminal prosecution.[47] The ADEA liquidated damages provision is the counterpart to this FLSA criminal penalty provision. Thus, it is important to examine how courts have interpreted "willful" in the FLSA criminal context. When considering "willfulness" under this FLSA provision, most courts have not required an evil motive on the part of the employer.[48] One court described an employer's conduct to be "willful" when an employer "wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not."[49] This definition is very similar to that of courts defining "willful" under the ADEA as knowing or reckless.[50] It is also consistent with the manner in which courts have applied "willful" in contexts other than the ADEA.[51]

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45. *Id.* at 154-55.

46. *Id.* at 155-56. The *Syvock* court is in agreement with Goodman v. Heubleing, Inc., 645 F.2d 276, 283 (2d Cir. 1981). The *Goodman* court's interpretation of the standard adopted in *Wehr* is that a violation was "willful" when the defendant either 'knew' or showed 'reckless disregard' as to whether its conduct was prohibited by the ADEA. *Goodman*, 645 F.2d at 131.

Under the *Syvock* test a plaintiff must prove "(1) that the employer knew or reasonably should have known what the requirements of the ADEA are; and (2) that the employer knew or should have known that his actions were in violation of the requirements of the ADEA. *Syvock*, 665 F.2d at 156 n.10.

47. The Act provides in part: "Any person who willfully violates any of the provisions of section 215 of this title shall upon convicton thereof be subject to a fine of not more than $10,000 or to imprisonment for not more than six months, or both." 29 U.S.C. § 216(a) (1982).

48. *See, e.g.*, Nabob Oil Co. v. United States, 190 F.2d 478, 480 (10th Cir. 1951); Hertz Drivurself Stations v. United States, 150 F.2d 923, 928-29 (8th Cir. 1945); Darby v. United States, 132 F.2d 928, 930 (5th Cir. 1943).

49. Nabob Oil Co. v. United States, 190 F.2d 478, 479 (10th Cir. 1951).

50. *See supra* notes 39-48 and accompanying text.

51. *See* United States v. Murdock, 290 U.S. 389, 394-95 (1933). In *Murdock*, the defendant was prosecuted under the Revenue Acts of 1926 and 1928 which made it a misdemeanor for a person "willfully" to fail to pay the required tax. *Id.* at 392. *See*

Very few courts have required a finding of an employer's specific intent to disobey or disregard the law when determining damages under the ADEA.[52] However, the district court in *Bishop v. Jelleff Associates*,[53] required that an employer have both knowledge of the ADEA and an intent to evade the provisions of the Act for a finding of willful conduct.[54]

FLSA, on the other hand, may require a showing of bad faith before double damages will be awarded. As originally enacted, the FLSA provided for the recovery of liquidated damages whenever there was a violation of the Act.[55] Since this resulted in a harsh interpretation of the provision, the FLSA was amended.[56] The amendment gives the court discretion in awarding liquidated damages if the employer can demonstrate good faith and reasonable grounds for believing that his or her actions were not a violation of the FLSA.[57] Since the remedial provision of the FLSA are incorporated into the ADEA, it is arguable that this amendment applies to the ADEA. Although some courts have held that the amend-

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also United States v. Illinois Cent. R. R., 303 U.S. 239, 242-43 (1938). In *Illinois Central*, the Court found that the defendant's failure to unload the cattle car showed a disregard for the statute and an indifference to its requirement and was a willful violation of the act. *Id.* at 243. See also Alabama Power Co. v. Federal Energy Regulatory Comm'n, 584 F.2d 750 (5th Cir. 1978) and F.X. Missina Constr. Corp. v. Occupational Safety & Health Review Comm'n, 505 F.2d 701 (1st Cir. 1974), where the courts relied on *Illinois Central* for the definition of "willful".

52. *See, e.g.*, Loeb v. Textron, Inc., 600 F.2d 1003, 1020 n.27 (1st Cir. 1979).

53. 398 F. Supp. 579 (D.D.C. 1974).

54. *Id.* at 593.

55. 29 U.S.C. § 216(b) (1982).

56. The FLSA was amended by Section 11 of the PPA which provides:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the Fair Labor Standards Act of 1938, as amended the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 260 (1982).

57. *Id.*

ment does apply to the ADEA,[58] a majority of the courts have held it does not.[59]

The Fifth Circuit has, however, held that this good faith defense does apply to the ADEA.[60] In *Hays v. Republic Steel Corp.*,[61] the circuit court reasoned that Congress intended the good faith defense be incorporated into the ADEA so that employers who acted in good faith would not automatically be subject to liquidated damages every time there was a "willful" violation.[62]

III. ANALYSIS

In *Trans World Airlines v. Thurston*,[63] the Court considered the various standards of "willfulness" discussed in the prior section and concluded that the appropriate definition is as follows: A violation of the Act is "willful" if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[64] In reaching this conclusion, the Court rejected the argument that a violation of the Act is "willful" if the employer simply knew the ADEA was "in the picture."[65] Since employers are required to post notices of the ADEA, it would be virtually impossible for an employer not to be aware of the ADEA and its provisions. Applying a broad standard like the "in the pic-

58. *See, e.g.* Rodriguez v. Taylor, 569 F.2d 1231, 1244 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Hays v. Republic Steel Corp., 531 F.2d 1307, 1310-12 (5th Cir. 1976); Bertrand v. Orkin Exterminating Co., 454 F. Supp. 78, 83 (N.D. Ill. 1978); Combes v. Griffin Television, 421 F. Supp. 841, 845 (W.D. Okla. 1976).

59. *See, e.g.*, Goodman v. Heublein, Inc., 645 F.2d 127, 129-30 (2d Cir. 1981); Kelly v. American Standard, Inc., 640 F.2d 974, 981-82 (9th Cir. 1981); Wehr v. Burroughs Corp., 619 F.2d 276, 279 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1000, 1020 (1st Cir. 1979); Hoffman v. Nissan Motor Corp., 511 F. Supp. 352, 354 (D.N.H. 1981); Ginsberg v. Burlington Indus., Inc., 500 F. Supp. 696, 702 (S.D.N.Y. 1980); Cleverly v. Western Electric Co., 69 F.R.D. 348, 352 (W.D. Mo. 1975).

60. Hedrick v. Hercules, Inc., 658 F.2d 1088, 1095-96 (5th Cir. 1981); Hays v. Republic Steel Corp., 531 F.2d 1307, 1311-12 (5th Cir. 1976).

61. 531 F.2d 1307 (5th Cir. 1976).

62. *Id.* at 1311.

63. 105 S. Ct. 613 (1985).

64. *Id.* at 624 (quoting Air Line Pilots Ass'n Int'l v. Transworld Airlines, 713 F.2d 940, 956 (2d Cir. 1983)).

65. *Id* at 625. The Court reasoned that even if the "in picture" standard were appropriate for the statute of limitations, it should not apply to a provision dealing with liquidated damages. *Id.*

ture" standard would result in an award of double damages in almost every case.

The same criticism is valid for the standard finding "willfulness" in violations that are knowing, intentional, or voluntary rather than accidental.[66] A recovery of double damages would be assured for every violation since an employer who treats an employee unfairly does so almost always knowingly and voluntarily. It is unlikely that an employer would accidentally or inadvertently discriminate against an employee because of age.

Another flaw in the knowing or voluntary standard is that under it an employer could be guilty of a willful violation without even intending to violate the Act. The *Thurston* Court noted that Congress did not intend such a result. It certainly did not intend for an employer who had consulted an attorney and believed to be operating within the boundaries of the Act to be liable for double damages merely because that employer acted knowingly and voluntarily rather than accidentally.

It is also unlikely that Congress intended the criminal standard of "willfulness" as applied in *Bishop* and *Loeb*.[67] Such a standard would impose too much of a burden on the plaintiff by requiring the plaintiff to demonstrate the employer's bad faith. This difficult burden would limit the number of plaintiffs receiving damages. The ADEA was enacted to end age discrimination and therefore should be interpreted in a manner which facilitates plaintiffs' claims.

It is likely that Congress intended the burden to be on the employer to show good faith as a defense to a finding of willfulness. Thus, the *Thurston* Court held that if good faith on the employer's part could be proven, an award of liquidated damages need not be awarded. This clearly follows the intention of Congress.

While Congress did not intend for an automatic award of liquidated damages every time it was proven an employer knew of the ADEA, it also did not anticipate allowing an employer to learn as little as possible about the Act and later use good faith as a defense. Congress did not intend to encourage

66. *See supra* notes 38-48 and accompanying text.
67. *See supra* notes 52-54 and accompanying text.

employers to ignore the law. For this reason the "reckless disregard" standard is appropriate. Under this definition, as adopted by the *Thurston* Court, a violation is "willful" if the employer knew or showed reckless disregard that its actions were prohibited by the ADEA.

This definition is an appropriate one for "willfulness." It gives employers a chance to prove their good faith. Yet, it does not permit defendants to ignore the law. The *Thurston* Court found its definition to be in accord with courts' interpretations of the FLSA provision for liquidated damages.[68]

The *Thurston* Court's standard for determining "willfulness" best serves the intention of Congress. It is fair to both employers and employees, and is consistent with the purposes of the ADEA. The standard will not result in a mandatory award of double damages in every case nor will it require a claimant to prove an intentional violation of the Act. It is a standard that courts will easily be able to apply to "willful" violations of the ADEA; the result will be the award of equitable and reasonable damages to injured plaintiffs.

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68. 105 S. Ct. at 624.